A LETTER TO THE Right Hon. *Charles James Fox*, OCCASIONED BY HIS MOTION RESPECTING *LIBELS*.

SECOND EDITION.

[PRICE ONE SHILLING.]

A

LETTER

TO THE

Right Hon. *Charles James Fox*,

OCCASIONED BY HIS

MOTION

IN THE

HOUSE OF COMMONS

RESPECTING

LIBELS:

AND SUGGESTING THE

Alarming Consequences likely to enſue, if the Bill now before the Legislature upon that Subject ſhould paſs into a Law.

By JOHN BOWLES, Esq.

OF THE INNER-TEMPLE, BARRISTER AT LAW.

SECOND EDITION.

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ADVERTISEMENT.

WHEN the Right Honourable Gentleman to whom the following LETTER is addreſſed, gave notice of a Motion on the ſubject to which it refers, the Author was deſirous of promoting a general acquaintance with the real principles of the exiſting practice, which the Motion above alluded to menaced with an attack; and fearing that the hurry of the attack and the defence would not allow ſufficient time to deliberate on a ſubject of ſuch vaſt importance, and of ſo copious a nature (though he had no idea that a garriſon ſo well provided would, at once, have ſurrendered at diſcretion), he ventured to lay before the Public a pamphlet intitled, "Conſiderations upon the "reſpective Rights of Judge and Jury, par-"ticularly upon Trials for Libel."

SINCE that publication the important Motion has been brought forward; and as the ſyſtem upon which an innovation is now attempted, was upon the diſcuſſion moſt eſſentially miſconceived, both as to its principles and its conſequences;

quences; and as a novel ſyſtem of a moſt ſerious nature is propoſed to be erected upon the very baſis of thoſe miſconceptions, the Author feels it to be his *additional* duty to endeavour to reſcue the preſent Practice from objections, to which, if thoroughly underſtood, it will not appear to be liable; and which he had too much candour to anticipate, at leaſt in the form in which they were made.

WHILE ſchemes of inconſiderate innovation are ſupported by general encomiums on the mode of Trial by Jury, the Public will remember that the true queſtion is, Which of the ſyſtems before them is moſt conſiſtent with the Conſtitutional Rights of Juries? The Author lays in his claim to an equally fervent, but a much more rational attachment to thoſe rights, than can conſiſt with any plan which confounds the important diſtinction between law and fact; and he wiſhes his ſentiments to be ſubmitted to no other teſt than their tendency to promote the original deſign, as well as to preſerve the real importance, reſpectability, and uſefulneſs of that ſacred inſtitution,

"A TRIBUNAL OF PEERS."

A

LETTER, &c.

SIR,

THERE is happily a fund of good ſenſe in this country, which is equal to the comprehenſion of all matters that relate to the true freedom of the ſubject, and, of courſe, to the real welfare of the community, however abſtruſe in appearance ſuch ſubjects may be. And that good ſenſe is accompanied with moderation, that will not only delay a final deciſion upon matters of importance, till a fair and complete diſcuſſion has been had, but will alſo ſubject even prejudices of long ſtanding to the teſt of ſuch diſcuſſion. Therefore, I do not doubt, that the preſent important inquiry reſpecting criminal proſecutions for Libel, will excite all that attention and diligence, which its importance deſerves; and that it will be purſued, both in and out of the Legiſlature, with the candour that is ſurely due, where the object of the inveſtigation is to aſcertain whether long eſtabliſhed modes of proceeding ſhould be altered.

THE fulleſt and moſt attentive conſideration that I have been able to give the ſubject, has had the effect of convincing me, that the objections lately urged againſt the preſent practice, upon its diſcuſſion in the Houſe of Commons, and which are now gone forth into the world, are entirely unfounded. This being, according to my ideas, the ſtate of the caſe, ſo far from making an apology for entering into an examination of theſe objections, I conceive that ſuch apology would imply but an indifferent compliment to that candour and frankneſs, which I hope will ever continue to be a prevailing feature in your character.

THE late diſcuſſion which the ſubject has undergone, relieves me from the neceſſity of eſtabliſhing, in contradiction to the many previous aſſertions to the contrary, that *the preſent practice of the Courts upon criminal proſecutions for Libel isconformable to the eſtabliſhed law of the land*; for an honourable and learned Gentleman has now furniſhed no leſs an authority than that, which ever accompanies his own name, for the above poſition. With infinite ſatisfaction did I hear that Gentleman temper his maſterly eloquence with the moſt noble ingenuouſneſs, by declaring that the Judges, far from deſerving cenſure for their conduct upon theſe occaſions, could not have acted otherwiſe than they did—and that, had he been on the Bench, he ſhould have governed his conduct by the ſame principles. Language cannot furniſh a more forcible anſwer to thoſe objections to the practice, which are founded on the

the ſuppoſition of its not being ſupported by law. Can it be conceived, that the Gentleman in queſtion would feel himſelf bound as a Judge to conform to a practice, which he conſiders as unfavourable to liberty, unleſs from a decided conviction, that it was ſo clearly and ſo firmly eſtabliſhed by the law of the land, as to leave him no diſcretion to deviate from it? The regular conſtant practice of his predeceſſors even for more than ſixty years, would never be able to fetter his vigorous and independent mind, if he ſaw that ſuch practice had been founded in the uſurpation of a juriſdiction, that did not belong to the Bench, or in an encroachment on the juriſdiction, that conſtitionally belonged to the jury. He never would admit ſo dangerous a principle, as that Courts by their forms of practice can preſcribe againſt the inviolable ſpirit of the conſtitution. He would loſe no opportunity to reſtore to the jury and the ſubject thoſe privileges, which, though intercepted by a current of deciſions, yet being originally interwoven in the Conſtitution itſelf, muſt be impreſcriptible. In a word, though his predeceſſors had for ever ſo long a time told juries that they had no right to decide the law, he would never have ſuffered himſelf to be bound by the authority of *names* to give a ſimilar direction, if he thought the jury were legally and conſtitutionally entitled to the right, from the exerciſe of which they had been ſo reſtrained.

THEREFORE the only queſtion that remains, is, not what is the law upon this important ſubject, but whether it ought to be altered? And

here I cannot but obſerve, that it would be a juſt cauſe for regret, if alterations were attempted in eſtabliſhed ſyſtems, before thoſe ſyſtems are thoroughly underſtood; for beſides the unjuſt imputations that ſuch attempts (however candidly meant) have a tendency to fix, a danger will exiſt that the alterations may be for the worſe, and that in the place of what is really good and beneficial (though miſconceived), what is really inconvenient or detrimental may be ſubſtituted. It will be for a judicious public to decide whether this obſervation is applicable upon the preſent occaſion.

THE object of the forms adopted by the law upon proſecutions for libel, as well as on other proceedings, is, to attain and exhibit as much certainty and preciſion in the ſtatement of the charge, as the nature of the caſe will admit of. In the criminal caſe of a libel, where the offence conſiſts in the effect intended to be produced upon the minds of thoſe, to whom the work may be communicated, the grand object in framing the record is, to diſcloſe upon the face of it, the real meaning and ſcope of the publication which is charged as criminal. And as the writer of a public or government libel generally means and intends more than he ventures fully to expreſs or avow, it is neceſſary to ſupply that deficiency by ſtating that conſtruction of the writing, which, if truly charged, conſtitutes its criminality; and it is the ſole and peculiar province of the jury to judge whether the true conſtruction is made: if they think it is not, an acquittal follows of courſe; for the Attor-

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ney-General, as proſecutor, is bound by his own conſtruction, as appears upon the record, and is not at liberty, upon the trial, to give the writing any other conſtruction than that which he has ſo charged.

In order thus to introduce a juſt ſtatement and conſtruction of a publication, according to a fair interpretation, the record makes uſe of *averments*, which have a double office, and are of courſe divided into two kinds. The firſt ſort furniſh a mere verbal explanation, and endeavour to fix the intended meaning of the language or other ſigns made uſe of by the author, in reference to the perſons or matter principally alluded to by him. Such averments are termed innuendo's, and ſeem to correſpond with what logicians call a definition of the name. In this reſpect they are extremely important, as terms are not only in their nature arbitrary, but frequently equivocal. And in bringing forward an explicit charge, nothing can be more fair than to point out in which of different poſſible ſenſes the material words in a writing, alledged in the whole to be criminal, are uſed. It is alſo the province of innuendo's to connect the relative as often as it occurs with its antecedent, where ſuch connection is eſſential to the giſt of the charge; and this in order to acquire a degree of preciſion which, however deſirable in allegations that impute guilt, are unneceſſary, and would be very ungraceful, in common ſpeech or writing.

The real import of the language being thus fixed by means of innuendos, the next object (and a ſtill more important one) is, to exhibit upon the record the true meaning, ſcope, and intended effect, of the publication. This is done by the aid of what are generally called, but in a reſtricted ſenſe, *averments*—which ſeem to agree with the definition of the thing, and which, on account of their higher office than that of the innuendo, have retained the generical appellation belonging to both: as in other caſes the name of the genus is ſometimes uſed to diſtinguiſh the moſt important ſpecies. Theſe averments are made uſe of to charge expreſsly that *particular* intent or tendency wherein the criminality of a public libel frequently conſiſts, and which furniſhes the ground for the proſecution; and, as ſuch intent or tendency cannot always be made to appear without pointing out an intended alluſion to extrinſic circumſtances, the averment introduces ſuch circumſtances upon the record, that the alluſion and the effect of it may be apparent. With ſuch explicit fairneſs does the law proceed in ſtating the accuſation, which it calls upon a man to anſwer; chuſing ſuch forms as are beſt calculated to preclude uncertainty, ambiguity, and miſapprehenſion; and referring, by poſitive and direct averments, the truth of the whole charge to the judgment of his peers. As to the epithets, they indeed contain legal inferences which refer only to the fact of publication, and inform the defendant that, ſuppoſing the work, as ſtated, to contain a libel, the law will preſume the publication of it to

be criminal, that is, intentional—giving him thereby an opportunity of proving, if he can, an innocent publication; as for inſtance, if it were produced by compulſion, or proceeded from mere accident.

THE information againſt John Luxford furniſhes a happy exemplification of the forms I have endeavoured to explain. The object of the proſecution was, by means of example, to check the progreſs, to prevent the repetition, and to obviate the effect of a publication, aſperſing the character of Great Britain, and aſſerting, that an armament, which we were preparing with unprecedented vigour and diſpatch to vindicate our national honour from an inſult avowed by the Court of Spain, was, under that pretext, really intended againſt France;—and this at a moment when the public mind of the latter nation was in a ſtate of the greateſt ferment and irritation, and diſpoſed to liſten to every whiſper of miſtruſt; and when the Government had been recently importuned for the performance of an ancient, and till then unbroken family compact, by ſupporting an old ally in its diſpute with this country. Any attempt to promote a compliance with this application tended to injure Great Britain moſt eſſentially, by increaſing the impediments in the way to that accommodation, which was indiſpenſable to her welfare, and which probably would not have taken place, if France could have been prevailed upon to join in hoſtilities againſt her. How far ſuch publications as that of Luxford might have operated in this manner, it is impoſſible now

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to ſay; but ſurely it was at leaſt a meaſure of prudence to endeavour to prevent that frequent repetition and induſtrious circulation thereof, which impunity would have encouraged; and which, by appearing to expreſs the prevailing opinion in this country, might have gained credit with our jealous neighbours and ancient rivals; to whom it might not appear very improbable, that, in imitation of their own former example, we ſhould be diſpoſed to take advantage of their diſtreſſed and critical ſituation.

Such being the publication, the malevolence and tendency of which were thought deſerving of particular attention on the part of Government, let us now ſee whether the information was not ſo conſtructed as to refer the real merits of the caſe to the jury.

This information begins with ſtating, by way of recitals (which are all averments for the conſideration of the Jury), his Majeſty's meſſage to parliament reſpecting the inſult the Britiſh flag had received at Nootka Sound, and the meaſures taken by Government in conſequence thereof. It then goes on to charge, that John Luxford "maliciouſly "and ſeditiouſly intending, deviſing, and "contriving to inſinuate, and cauſe it to "be believed, that our ſaid Lord the King's "ſaid meſſage was deceitful, and held out "falſe colours and pretences to his ſubjects; "and, as far as in him the ſaid John Lux-"ford lay, to interrupt, diſturb and deſtroy

"the

" the friendſhip, good-will, peace, harmony " and concord ſubſiſting between our ſaid " Lord the King and his ſubjects, and the " French King and his miniſters, and the Na- " tional Aſſembly and people of France; and " to excite the French King and his mini- " ſters, and the National Aſſembly and people " of France to unite with and aſſiſt his Catho- " lic Majeſty and his ſubjects in reſiſting and " waging war againſt our ſaid Lord the King " and his ſubjects," &c. *printed and publiſhed, &c.* in the uſual form of charging the publication and introducing the Libel, part of which, as ſtated in the record, is as follows: " This is too thin and ſcanty a veil to co- " ver ſo much, and ſo inſolent preparations " for war; there muſt, therefore, be ſome " other lurking cauſe for theſe furious pro- " ceedings (meaning the proceedings men- " tioned in the ſaid meſſages) than Miniſters " (meaning the Miniſters of our ſaid Lord " the King) have yet brought to light."

The information afterwards proceeds in the third and moſt material count thus to recite the libel: " We cannot diſmiſs this ſerious and " alarming ſubject (meaning the ſubject of our " ſaid Lord the King's meſſages) without ob- " ſerving that the manœuvre of our Miniſtry " (*meaning* the conduct of our ſaid Lord the " King's Miniſters with reſpect to the matters " ſtated in the ſaid meſſages) will make a very " deep impreſſion upon the French Cabinet, " National Aſſembly, and people in general.

" They will ſooner think that the armament is " deſtined againſt Breſt and Toulon *(meaning* " Breſt and Toulon in France) than againſt " Cadiz and Barcelona) *(meaning* Cadiz and " Barcelona in Spain)." Hitherto I agree with you, that the word " meaning" is uſed as an innuendo; but I beg your attention to the application of it in the following paſſage:

" They will find ways and means to co- " aleſce among themſelves ſo as to put the " ſtate machine in order, ſo as to lend their " efficacious aid to their never-failing allies the " Spaniards *(meaning and intending thereby to* " *have it believed, by the Miniſters of the French* " *King and the National Aſſembly and people of* " *France, that our ſaid Lord the King was* " *about to commence war againſt the domi-* " *nions and people of France, and meaning* " *and intending thereby to alarm the French* " *King and his Miniſters, and the National* " *Aſſembly and people of France, and to* " *excite them to unite with and lend aſſiſt-* " *ance to his Catholic Majeſty and his ſub-* " *jects, in waging war againſt our ſaid Lord* " *the King and his ſubjects).*

I will now, Sir, refer it to your own candour, whether you were warranted in aſſerting, either that the above paſſage on which you ſo particularly dwelt was inſerted by way of *innuendo*, or that if Luxford had combated that part of the charge *upon a trial*, the Court would have told him it was a legal inference and not an innuendo; or that, if he had afterwards objected to the

the inference *in arreſt of judgement*, the Court would then have ſaid it was not an inference, but an innuendo, contained in the body of the record. While I entirely agree with you that this paſſage was neither an innuendo (as it implied "purpoſing," and not "importing"), nor a legal inference (as the juſtneſs of it could be referred to no one principle of law), how am I to account for your overlooking what it really was, namely, *an averment expreſsly charging the criminal intent of the defendant in his publication.* If you had happened to think of averments, you would have ſaved yourſelf the trouble of expatiating upon this information, which, if rightly underſtood, is much more hoſtile than friendly to your ſcheme of alteration, as it proves that your complaints againſt the preſent practice are unfounded. No one could have collected from your ſpeech that ſuch a form as an averment was even in uſe. But upon reading the information itſelf it is impoſſible not to obſerve the ſolid diſtinction between the averment and the innuendo; and though the word "meaning" is applied to both, the difference is not the leſs obvious; for when it is uſed as an innuendo it introduces by itſelf a mere verbal explanation of what precedes, as "*meaning* Cadiz and Barcelona in Spain," but where it appears as an averment of the defendant's intent, ſhewing thereby the drift of the libel, it is accompanied with other words, which mark more pointedly the office it then aſſumes, and put it beyond all doubt in what ſenſe it is uſed; as "meaning and *intending thereby to have it be-*

lieved by the miniſters of the French King" &c. and meaning and *intending thereby to alarm the French King and his Miniſters, &c.*

The charge being ſo explicitly and ſo fairly conſtructed, it is but candid to ſuppoſe, that it would have been as fairly tried if Luxford had choſen to go to a Jury. On what grounds therefore did you bring ſo ſevere a charge againſt the Judges as was implied in in your conjecture that before a jury they would have called this term " meaning" a legal inference, in order to withdraw its effect from the conſideration of the Jury; and that afterwards, upon arreſt of judgment, they would have called the ſame term " an innuendo," found by *that* jury, which they had prevented from finding it, by telling them it was no ſuch thing? If you thought that the practice of the Judges warranted the ſevere accuſation, that they are accuſtomed one day to deny a thing to be what another day they ſolemnly affirm it is; and on one occaſion to declare it to be, what on another they deny that it is, and all this in order to deprive a jury of the exerciſe of their functions; then, Sir, give me leave to ſay, you neglected in a moſt flagrant manner an important duty, of which, at the ſame time, you ſeemed acutely ſenſible, that *of watching over the exerciſe of the judicial power.* Inſtead of a Committee, you ſhould have moved for an Addreſs to remove ſuch prevaricating Judges, who certainly in the caſe you ſuppoſe would have deſerved cenſure ratherthan thoſe compliments which you were

pleaſed

pleaſed to pay them; compliments which, accompanied as they were, reminded me of an old melancholy ſtory, relating to certain perſons named Joab and Amaſa*. Indeed your honourable and learned Friend, feeling, I preſume, the unjuſt ſeverity of your charge, loſt no time in doing away the imputation; as he nobly declared in an early part of his ſpeech, that the Judges had been free from blame and cenſure; and that in their ſituation he ſhould have acted preciſely in the ſame manner as they had done. No one will ſuppoſe that gentleman ſo great a foe to the cauſe of truth, and juſtice, and to the rights of jurymen, as to be capable of groſsly and intentionally deceiving them, by declaring *that* to be no *innuendo* but *a legal inference*——*which* he would afterwards ſay was not a *legal inference*, but an *innuendo* actually found by the jury: and though a little time and reflection would have vindicated the Judges from your charge, it was pleaſing to have the temporary impreſſion it made ſo inſtantaneouſly removed, and by ſuch reſpectable authority.

CAN a doubt, however, remain in the mind of any one, after reading the publication and the information, whether the full merits of John Luxford's caſe were not ſufficiently referred to a jury, if he had choſen ſuch a reference? Had he gone before a jury, and they had not been convinced that his intention in publiſhing the paper was to excite, as far as in him lay, hoſtilities between this

* See 2. Samuel, c. 20. v. viii. ix. x.

country

country and France, they would have acquitted him. For ſuch according to the information is the giſt and and eſſence of the charge, which a Judge, in conformity with the eſtabliſhed doctrines and practice of the courts, would have pointed out as the chief matter for their conſideration. In ſhort, there was but one point which this information did not refer to the jury; namely, Whether a publication, by a ſubject of Great-Britain, violating his allegiance to Government, and endeavouring to involve his country in hoſtilities, is a Libel. That indeed is a queſtion of law* which could not occur upon a trial of the truth of the information; but without entering into ſuch an inquiry, the jury, I believe, would have been quite contented with the office of enquiring and determining whether the charges in the information were true.

The practice of Judges in ſumming up to juries entirely correſponds with the purport of thoſe forms of proceeding which I have endeavoured to illuſtrate. In the much-cited caſe of the King and Woodfall, Lord Mansfield directed the jury to conſider, "whether all the "innuendoes and all the applications to matter "and perſons made by the information were in "their judgment the true meaning of the paper, "If they thought otherwiſe, they ſhould acquit "the defendant; but if they agreed with the in-"formation, and believed the evidence as to the "publication, they ſhould find him guilty."

* See my "Conſiderations on the reſpective Rights of Judge and Jury," &c. 2d edit. p. 47, 48.

And

And in a more modern caſe, the King and Stockdale, Lord Kenyon told the jury, "that "they were to make up their minds whether the "publication was meant as an aſperſion upon "the Houſe of Commons; and in order to do "that, they were not to confine their atten-"tion to thoſe detached paſſages which the "Attorney-General had ſelected, but *to look at* "*all the context, at the whole book*; and again, "*to ſee whether the ſenſe the Attorney-General* "*had affixed was fairly affixed.*"

An information or indictment for a libel ſhould ſtate *all* the facts of the caſe, leaving the law upon that caſe open upon the record, as it ever muſt be upon a full ſtatement of facts; and it is the province of the jury to find the truth of the whole record from the evidence; with this ſingle exception, that the epithets, being merely inferences of law from the printing and publiſhing, are to be preſumed, unleſs rebutted by proof. Not only the fact of publiſhing, but alſo the innuendoes, the averments,—the meaning,—are excluſively within the cognizance of the jury; and as in a government libel the ſcope and intent of the publication are almoſt invariably averred, it is for the jury to ſay by their verdict whether ſuch averments are true;—and as an inference of one fact from another is a queſtion of fact, they alone can legally aſcertain, whether ſuch inference is juſtly drawn. What more can be deſired for juries to do? One would think this afforded them an ample extent of juriſdiction. But attempts are made to extend their powers. A bill is even now

before

before the Legiſlature for that purpoſe. It is highly important for that Legiſlature to conſider deliberately and maturely what will be the conſequence of ſuch a bill; and I will not heſitate to declare, that it would tend to unſettle and ſubvert our judicial conſtitution in criminal caſes. I invoke the attention, not only of yourſelf, but of the public and of Parliament, while I aſſign the reaſons on which this aſſertion is founded; as its truth or falſehood ought to influence in the rejection or the adoption of a propoſal, the moſt ſerious in its nature and conſequences that can exerciſe the attention of a legiſlative body.

HOWEVER the plan offered to the Houſe may be covered with the ſpecious pretext of leaving the whole caſe upon proſecutions for libel, as upon other proſecutions, to the deciſion of a jury, aided by the experienced advice of a Judge, ſo that a general verdict may enſue, the only poſſible effect of ſuch a meaſure would be to give them an excluſive cognizance of the law. All the facts, of whatever nature, it is already their excluſive province to decide; nothing therefore remains but to extend their province to the law. To do that, would imply that the law was before defectively adminiſtered;---that they are better qualified than the Judges to decide it; and that as it is a part of their office, it is alſo a part of their duty ſo to do. No reliance is to be placed upon their liſtening to the advice of the Judge. What, take advice from thoſe we ſupplant! liſten to thoſe who are removed for incompetency, and

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in whoſe places we are ſubſtituted! Beſides, the advice of a Judge will hardly be wanted; that of Counſel may be abundantly ſufficient, and will probably be more palatable, it being more likely to be cloathed with all the winning ſoftneſs of perſuaſion, wooing for a verdict. The new mode of practice, though not favourable to the learning of Advocates, will certainly improve their graces in elocution.

But the chief fallacy of the propoſed ſyſtem conſiſts in the pretence, that it will only have the effect of putting caſes of libel upon the ſame footing with all other criminal caſes; inſtead of which, it will have a manifeſt tendency to make juries the diſpenſers of *all criminal law*. If in a caſe where they have hitherto had only a cognizance of facts, an act of parliament is found neceſſary to be made, the ſole operation of which is to authorize them to decide the law, and *that* upon the ground of analogy to other criminal proceedings, they will be much more diſpoſed, from ſuch a circumſtance, to conſider themſelves as the ſole arbiters of the law in all criminal caſes, than to receive their new juriſdiction with any qualification or reſtriction whatſoever. They will be apt to ſuppoſe that the Legiſlature thought their honeſty and impartiality would atone for their deficiency in legal knowledge; and that the fundamental principle of our criminal juriſprudence is not ſo much a deciſion according to rule, as a deciſion founded in honeſt intentions. Beſides, as there is a ſtrong propenſity in human nature to think well

of our own qualifications, they will be encouraged, by the confidence ſo repoſed in them by the Legiſlature, to imagine, that ſomehow or other, they poſſeſs a competent knowledge to decide the law in all criminal caſes; or, at leaſt, that a general ſenſe of right and wrong will be adequate to furniſh a ſufficient guide for their direction; and however great their errors or abſurdities in their legal practice may be, they will be all concealed by the impenetrable veil of a general verdict, and thereby be put out of the reach of all further examination or correction. In the mean time, the rules of law upon criminal caſes will remain a dead letter upon the pages of our ſtatute and other law books; and it will be totally impoſſible to know by what rule a criminal has been tried or will be tried. The obſcurity which muſt attend the exerciſe of the double juriſdiction of law and fact, united in the ſame perſons, will expoſe to temptation even that integrity, which may ſo ſafely be relied upon when their attention is confined to the facts. They will have much better opportunities of indulging a partiality of every kind; and while the leſs important rights relating to property will be carefully protected by a certain rule, the enjoyment of our liberties and our lives will depend upon the caſual opinions of twelve men, or of ſuch of them as may poſſeſs (not the largeſt ſhare of knowledge) but the moſt vigour of body and perſeverance of mind. The Judges will hereby be deprived of all conſequence, reſpectability, and powers of uſefulneſs in criminal

nal proceedings. The important taſk of deciding the law will be ſhifted from perſons of legal knowledge and public reſponſibility, to others, in whom legal knowledge cannot be ſuppoſed to reſide, and who are free from all reſponſibility whatever. The whole code of criminal law will be virtually repealed; for that law, conſidered as a *rule* of conduct, will ceaſe to have any certain execution; and we ſhall be entitled to apply the truly juſt obſervation, that *where law ends, tyranny begins.*

I HAVE not mis-ſtated the object and the effect of the propoſed bill, in aſſerting, that it tends to put the whole adminiſtration of criminal juſtice into the hands of juries; for the very foundation of the bill is a ſuppoſed diſtinction between civil and criminal caſes, as to the perſons entitled to adminiſter the law. This diſtinction was relied upon by an honourable and learned Gentleman in the caſe of the Dean of St. Aſaph, and in his eloquent ſpeech in ſupport of your motion for a committee. I am ready to join iſſue with that Gentleman upon the exiſtence of ſuch a diſtinction, as known to the conſtitution, and I challenge him to bring a ſingle argument to controvert the following poſition: *That the Judges nominated by the Crown are the only conſtitutional depoſitaries of the laws of this kingdom, both criminal and civil; and that it is a duty inſeparably and excluſively annexed to their office, either by a direct, or by a ſuperintending and controuling juriſdiction, to diſpenſe thoſe laws according to the ſtatutes made by the legiſlature, and the principles eſtabliſhed by the common law.*

THE honourable and learned Gentleman, admitting that the cognizance of the law in civil caſes belongs to the Court, has indeed brought two arguments to prove, that in criminal caſes the right of deciding the law is veſted in the jury.

FIRST, that while the application of the law, in every civil caſe, *originates* in the authority of the Court, the adminiſtration of criminal juſtice *originates* with the people, by the means of Grand Juries. That this is an invaluable excellence in our conſtitution, I allow; but it remains to be ſhewn how the mild caution of the law, in requiring the accuſation of a *Grand Jury* before a man ſhall be tried for an offence, tends to prove, that the *Petit Jury* has a rightful cognizance of the law. The object of civil juſtice is to ſecure the rights of individuals; therefore every individual is entitled to the interference of the judicial power, to inveſtigate his claims upon other individuals;—and there can be no poſſible reaſon for a previous form of inquiry, whether ſuch inveſtigation ſhould take place; on the contrary, ſuch a practice could only tend to delay and vexation. Every perſon muſt be liable to anſwer *in foro* the demands of his neighbour; and the ſhorteſt mode of aſcertaining whether thoſe demands are well founded is the beſt for both parties. But in criminal caſes it is not private rights, but public juſtice, that the law has in view; no individual has there a ſeparate or peculiar intereſt, but the concern is that of the whole community in its collective capacity. There appears therefore

therefore a ſingular propriety in then requiring the *accuſation* of a public body, like a grand jury, repreſenting, as it were, the ſociety at large. It would render criminal juſtice too cheap and common to put the exerciſe of its important functions within the call of every individual. Beſides, it would be an intolerable hardſhip and cruelty, if perſons were liable to incur the diſgrace and the riſk of a trial, whenever any proſecutor might think proper to prefer an accuſation. The conſtitution mercifully conſiders, that it is an awful ſituation to be upon trial, charged with an offence againſt the laws. It therefore requires the ſanction of a grand jury, before a man can be called upon to anſwer ſuch a charge. But a grand jury *decide* nothing —they merely judge whether or no an indictment ſhall be preferred. In the words of Blackſtone *, "they ſit and receive indict-" ments, which are preferred to them in the " name of the king, but at the ſuit of any pri-" vate proſecutor; and they are only to hear " evidence on behalf of the proſecution: for " the finding of an indictment is only in the " nature of an inquiry or accuſation, which is " afterwards to be tried and determined; and " the grand jury are only to inquire upon their " oaths, whether there be ſufficient cauſe to " call upon the party to anſwer it."

THUS are grand juries benignantly interpoſed between wanton, capricious, or unfounded accuſations, and the diſgraceful calamity of being put upon trial on a criminal charge. There is

* 4. Bl. Com. p. 303.

no pretence for ſaying that they decide the law any more than another proſecutor. Before the law can be decided the facts muſt be eſtabliſhed, for *ex facto oritur jus*; and this muſt be done by another juriſdiction: their verdict is expreſſed by the form of "a *true* bill," or "not found;" and in the latter caſe a freſh bill may afterwards be preferred to a ſubſequent grand jury. How is it poſſible to deduce from ſo conſiderate and humane an inſtitution, that a petit jury, who, in the *indiſpenſable* preſence of a *Judge*, are to inveſtigate the charge thus advanced, are the judges of the points of law that may ariſe upon that charge? —Becauſe the law, through a merciful regard to life and liberty, exacts more caution in the inception of a criminal than a civil proceſs, can that circumſtance have a tendency to enlarge the powers of a jury?—Both upon an action and an indictment, the whole caſe, as to fact and law, is to be inveſtigated and decided after the proceedings are regularly commenced, and the matter completely brought before the competent tribunal: any difference, therefore, in the form of proceeding previous to ſuch commencement, does not either diminiſh or extend the power of that tribunal, nor change the functions of its conſtituent parts. It is admitted, that in civil caſes, it is the province of the court to judge of the law; and I preſume the reaſon to be, that they are moſt competent to execute that office in a manner beneficial to the public. And as the ſuperior importance of criminal to civil proceedings, both in their nature and their conſequences, has been the

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cauſe that a double teſt is there eſtabliſhed for the inveſtigation of *truth*, namely a *grand* jury and a *petit* jury, can any reaſon be aſſigned why the *law* ſhould be adminiſtered with leſs caution, with leſs preciſion, with leſs judgment, in criminal than in civil caſes? Will it be contended, that the jury are as much ſuperior to the Judge in the knowledge of criminal law, as he ſurpaſſes them in the ſcience of civil juriſprudence? It happens, on the contrary, that he is, *ex officio*, bound and preſumed to be equally competent in both branches, and the jury are not ſuppoſed to have any competence in either.

I DO not mean to deny that jurymen often poſſeſs learning and abilities that would do honour to any ſtation; but as without ſuch endowments a perſon may be perfectly well qualified for ſerving on juries, we muſt not preſume on any other talents in the character of a juryman than ſound integrity, ſtrict impartiality, and a competent ſhare of ſound ſenſe to inveſtigate matters of fact. And as it is fair to take it for granted, that a jury (notwithſtanding ſome exceptions) are not converſant with legal topics,—ſo we muſt judge of them according to their general deſcription, and not from particular or poſſible inſtances.

IT has indeed been ſuggeſted, that the ſimplicity of the law in criminal caſes is ſuch, as to bring it properly within the cognizance of juries. One would hardly imagine, after ſuch an obſervation, that our criminal code is ſo very

very extenſive as it unfortunately is—or, indeed, that we have any criminal code at all. It would be, perhaps, an exceſs of candour in gentlemen, who adopt the above mode of reaſoning, to ſtate the immenſe catalogue of offences known to the law of England—the variety of their denominations, degrees, and diſtinctions—the infinity of intricate queſtions which have ariſen at different periods, upon the application of general rules to particular facts; and which, having been conſidered by Judges, and not by Juries, have given riſe to ſolemn deciſions, publicly declared, and regularly preſerved in books of authority, as rules for future caſes of a ſimilar nature; acquiring thereby, in a manner, the force of law. Such an enumeration would hardly ſtrengthen the doctrine of the legal competence of juries upon criminal caſes. Indeed the want of ſimplicity in our code of criminal laws is frequently (and perhaps juſtly) conſidered as a matter of complaint. How the evil will be remedied by referring the expoſition of that code to Juries inſtead of Judges, I am at a loſs to conjecture; unleſs, indeed, that by a daſhing general verdict they may cut the knot which they cannot untie.

A SECOND argument adduced by the honourable and learned Gentleman in ſupport of his diſtinction between civil and criminal caſes, as to the province of the jury, is, that if in taking upon them the deciſion of the law in criminal caſes they miſtake the law, they are not liable to an attaint, as they would be for miſtaking the law in civil caſes. A complete anſwer to this

argument

argument is to be found in Hawkins's Pleas of the Crown, b. 1. p. 349.

Besides the above two arguments, drawn from the uſe of Grand Juries, and the now antiquated law of attaints, in ſupport of the doctrine that juries have the cognizance of the law in criminal matters, I can find nothing in the ſpeeches of two men of the firſt ability, but that general kind of obſervation, which is rather addreſſed to the feelings than the judgment, and which refers to the general importance of trial by jury, and what they call the ſpirit of the conſtitution. But I conceive it is equally fair and juſt, and abundantly more apt, to apply thoſe topics to the reverſe of the ſyſtem they are introduced to ſupport. For ſurely the importance, the utility, and I will add the reſpectability of juries will be much better ſecured, and the rational ſpirit of the conſtitution better enforced, by a jury's confining their attention to ſubjects with which they are converſant, than by their venturing to diſcuſs and to determine matters with which in general (whatever exceptions there may be) they muſt be preſumed to be unacquainted; and thereby depriving the public of the advantage of that ſcience, which the Judge on the bench has acquired by great ſtudy and pains—by the *viginti annorum lucubrationes.* In purſuing truth with attention, aſſiduity, and diſcernment, in aſcertaining the real facts and circumſtances of the caſes, and the real motives of the parties that come before them (whenever an enquiry into thoſe motives is material), they will find ſufficient exertion for their faculties, and ſufficient opportunities for uſefulneſs, to

ſatisfy the moſt public-ſpirited perſons among them. They will, when ſo employed, be *indeed* the barriers of the conſtitution, the palladium of the rights of the people againſt any poſſible encroachment of power, or attempts to injure and oppreſs; for nothing can ſo effectually counteract the views of injuſtice and oppreſſion as a fair, a full, a public inveſtigation of facts. While Truth maintains her empire in courts of juſtice, there can be but little chance for the perverſion of law to the purpoſes of oppreſſion; as long as Truth can be made to appear in all her native ſimplicity and purity, free from any foreign mixture, Injuſtice will in vain attempt to ſhew her head. The only thing further to be deſired is, that the law ſhould be as ably and judiciouſly examined, and as publicly and explicitly declared, as the facts; which can only be the caſe while it is pronounced from the bench, received by the jury as it is ſo pronounced, and *faithfully* incorporated in their verdict; unleſs, by means of a ſpecial verdict, they chuſe that it ſhould undergo a ſtill more ſolemn inveſtigation. If therefore the jury, inſtead of confining their judgment to the elucidation of facts, and the eſtabliſhment of truth, attempt to examine and decide the law, they deſtroy the important diſtinction between law and fact, and become the ſource of error, uncertainty, and injuſtice.

It has been alſo obſerved, that "the "guilt of crimes conſiſts in the intention," and that therefore they are peculiarly fitted for the conſideration of a jury. This is a kind of argument that rather ſhuns than meets the point in diſpute; and its ſole object is to con-

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found the law and the fact, which are as distinct in criminal, as they can possibly be in civil cases. The intention, as far as that inquiry is material, is certainly within the province of the jury; but this is entirely a question of fact, and quite distinct from every consideration of law. Intention is of two kinds:—first, a general intention; which implies merely the consciousness attending any act, and which must always by presumed from the act itself, unless rebutted by evidence destroying that presumption, as compulsion, lunacy, &c.—secondly, a particular intention; which (aided by other circumstances) denominates an act to be of a particular description, declared by the law to constitute a specific offence. Thus, in a case of homicide, it must be presumed that the party who did the act which occasioned the unhappy event, was conscious thereof (that is, that he was an agent), unless the contrary is proved: as for instance, in firing a gun, an intention to fire it is supposed; but if the person was a lunatic, or if the gun was forced into his hands, and held there by superior strength till it went off in the struggle, he could not be said to do the act in any sense. Then follows the inquiry respecting the particular intent, that is, the state or intent of the party's mind which induced him to do the act; and which, explained by, or united with, other circumstances, denominates it either murder, manslaughter, homicide *per infortunium* or *se defendendo*, or justifiable homicide. If it appears that the prisoner did the act under circumstances evidencing on his part a cool deliberate resentment, or a wanton unprovoked attack, it is the case of malice aforethought (express in the first instance, implied in the second), and

the law declares the caſe to be murder: if the party was under the immediate influence of paſſion, excited by a ſudden affray, it would then be an unlawful killing (but without malice), and denominated manſlaughter; though in that caſe, if the party ſlaying had no way of preſerving his own life but by killing his opponent, the homicide would be excuſable, on the principle of ſelf-defence; but then the neceſſity muſt be made to appear: again, where the killing is merely accidental in the exerciſe of a lawful act, as if a perſon *qualified to ſhoot* has the misfortune to be the cauſe of ſuch an accident in the courſe of his amuſement, this would be homicide *per infortunium*, or miſadventure;—but if he had occaſioned the death while engaged in an unlawful act, as if he had been *unqualified*, he would have been guilty of manſlaughter. Laſtly, if he had killed a robber breaking into his houſe, it would have been juſtifiable homicide. Theſe diſtinctions, whether they ariſe from the particular intent or ſtate of the party's mind, or from external circumſtances, are all equally inquiries of fact for the jury. The malice, the ſudden heat, the neceſſity, the accident with or without a qualification, and the domeſtic defence, are mere facts to be eſtabliſhed by evidence. The intention, therefore, *as far as a queſtion of that ſort is material, muſt be found by jurors* *. But what the

* The poſition, that "guilt conſiſts in intention" is calculated to deceive, by the general manner in which it is expreſſed and applied. If it were meant only to aſſert "that there is no crime without a bad intention," I ſhould not object to it in that form; but ſo far from its being true, that guilt conſiſts altogether in intention, there are caſes where, without the leaſt difference in point of intention, an offence may be either *Capital*, a *Grand* or a *Petty Larceny*, according to circumſtances totally independent of the mind of the party. Thus the crime of ſtealing *privately* from the perſon property above the value of 12d. is a capital felony, and puniſhable with death—but if the owner is at all ſenſible of the tranſaction before the theft is accompliſhed, the offence is *Grand Larceny*—and if the property ſtolen be under the value above mentioned, the caſe is that of *Petty Larceny*.

law

law ſays upon theſe diſtinctions, and a great variety of others that might have ariſen upon the ſame charge, is to be known only from the law itſelf. And it is of the utmoſt importance that this ſhould be decided by the Judge, who has made that law his ſtudy, rather than by the jury, who in general can be ſuppoſed to poſſeſs but very vague notions upon the ſubject; and who, for want of a better acquaintance therewith, might very probably hang a man who was only guilty of manſlaughter; or acquit one who had committed a murder, becauſe *expreſs* malice was not proved.

The doctrine, that what the Judge ſays as to the law is only by way of advice, which the jury have a right to reject if they pleaſe, is palpably abſurd, and therefore unconſtitutional; for to determine upon the goodneſs of advice requires even more knowledge and competence on the ſubject than the party poſſeſſes, whoſe advice may be ſo rejected at pleaſure; whereas the direct reverſe of this is here the caſe. The only rational, and of courſe the only conſtitutional ſyſtem is, that the declaration of the Judge ſhall be taken for law, unleſs by means of a ſpecial verdict a fuller examination of the law be obtained. We ſhall then hear and know upon what principles criminal juſtice is adminiſtered—one deciſion will ſerve as a guide for another, and ſimilar caſes will be adjudged by the ſame rules. There will be then ſomething like certainty and uniformity in criminal proceedings; but if all authority be taken from the Judge, and he be reduced to the office of a mere regiſter of the verdict (a ſuggeſtion, I muſt ſay, not very decent), we may bid adieu to all ſecurity for our liberties and lives. Admitting that juries are "the Commons Houſe of the Ju-

dicial Syſtem," if they have a right to decide the law in criminal caſes in oppoſition to the opinion of the Judges, injuſtice is done them by the above ſtriking alluſion; for then they are not only the Commons Houſe but the *whole Legiſlature* as to criminal law: for if perſons decide the law who are not acquainted with it, they muſt legiſlate in every caſe; their deciſions will not ſay *what the law previouſly was*, but *what it is to be*; and that not as a general rule, but as confined to the particular inſtance; and what is ſtill worſe, all this will be done by an *ex poſt facto* declaration.

THIS diſtinction of offices in the adjudication of law and fact being ſupported by a maxim the authority of which could not be queſtioned, I mean, *Ad quæſtionem facti non reſpondent judices, ad quæſtionem juris non reſpondent juratores*, you, with your wonted ingenuity, endeavoured to diſprove its application to criminal caſes, by ſaying, that it is merely applicable to thoſe caſes where the law and the fact are ſeparated upon the pleadings. If this expoſition were juſt, the maxim would not apply to Trials by Jury, in cauſes between party and party; for there the law and the fact are as much united in the pleadings, upon a general iſſue, as *nil debet*, *not guilty*, &c. as in criminal caſes. But it was not denied either by yourſelf or your honourable and learned Friend, that in civil matters the whole cognizance of the law is with the Judge. Nor is there any thing in the maxim itſelf, that points to a diſtinction between civil and criminal caſes. On the contrary, it appears

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to be a clear, poſitive, univerſal rule (and that expreſſed negatively, which makes it much ſtronger), precluding in its nature and its form any exception, reſtriction, or qualification whatever. Beſides, if the maxim were meant merely to expreſs the diſtinct office of Judge and Jury where the law and the fact are ſeparated by the pleadings, it would imply that where ſuch ſeparation does not exiſt, the cognizance of the law as well as of the fact is with the jury; and then the whole effect of the maxim would have been obtained completely by the ſingle clauſe, "*ad quæſtionem juris non reſpondent juratores*," and the other clauſe would be entirely ſuperfluous; contrary to the aim of all maxims, which is to expreſs their meaning as conciſely as poſſible. For if the maxim implies, that where the law and the fact are not ſo ſeparated, the jury decide both, the only effect of the ſeparation of thoſe queſtions upon the pleadings would be, to withdraw from the jury the cognizance of the law, and not to preclude the Judge from the cognizance of the fact, which he was not intitled to before.

But admitting, for the ſake of argument, that the maxim was meant to be confined to caſes where the law and the fact are ſeparated by the pleadings, even in that ſenſe it confirms the doctrine, that in caſes of libel the law is not within the cognizance of the jury; for there the very ſeparation alluded to exiſts; the facts being, from the peculiar nature of the caſe, as diſtinctly and ſpecifically alledged, as by a ſpecial plea in a civil action, ſo that it is impoſſible to unite them with the law in the

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ſame iſſue; but the defendant muſt, in anſwer to the charge, either deny the facts to be true, or deny that, if true, they amount to a libel in point of law. If he does the firſt, he pleads "Not guilty;" if the ſecond, he demurs. The plea cannot by any means be conſtrued into a denial of the law, nor the demurrer into a denial of the fact. And it is, if properly underſtood, a great advantage to the defendant, that he may, in the firſt inſtance, chooſe that mode of defence which is adapted to his caſe, and thereby render an inveſtigation of the other branch unneceſſary; particularly as upon an unſucceſsful attempt to refute the charge by one of the two modes in his choice, he is not precluded from taking all the advantage that the other can poſſibly afford. This way of proceeding is ſo fair and candid, and ſo favourable to an expeditious and beneficial adminiſtration of juſtice, that inſtead of there being any reaſon for changing the forms of proceeding upon libels, in order to put them upon the ſame footing as in other criminal charges, where the law and the fact are neceſſarily blended in the general iſſue, it would be fortunate for the purpoſes of public and private juſtice, and unfavourable to litigation, if it were poſſible to exhibit the ſame clear diſtinction between law and fact in all caſes. But while that is impoſſible, there is no reaſon that we ſhould ſacrifice ſubſiſting advantages for want of ſufficiently underſtanding them *.

* I have endeavoured to explain the nature and cauſe of this difference between proſecutions for libels and for other offences, in the before-mentioned tract entitled "Conſiderations, &c." p. 22 to 27.

I SHALL conclude at preſent with ſuggeſting, that the principle of your Bill, if carried into effect, would tend to the continual diſturbance of the public tranquillity, and perhaps to the ſubverſion of ſociety itſelf. For if upon proſecutions for Government Libels the matter of law were to become a ſubject of regular diſcuſſion upon the trial of the iſſue, defendants in ſuch caſes would deſpiſe the preſent mode of reſiſting the charge; and inſtead of endeavouring to convince the Jury that they had not intended to aſperſe a Houſe of Commons, or to excite ſedition, inſurrection, rebellion, internal tumult, or foreign war, they would declaim, that Publications which are pointed to ſuch conſequences, far from being Libels in point of law, are a legal exerciſe of conſtitutional rights; that it is the privilege of every individual in a free country to ſay what he pleaſes of all matters that in any ſhape relate to Government; that Kings and Parliaments may be abuſed and vilified without any crime in law; nay, that as the "ſervants" of the people they may be diſmiſſed at pleaſure; and that every one has an indefeaſible right to call in the aid of a free preſs, to effect, if poſſible, the diſſolution of a Government or a Conſtitution which he diſapproves, and to eſtabliſh another in its room. All this would be matter of argument before a Jury, if, by the operation of ſuch a Bill, the *law* ſhould be put within their cognizance: for ſuch conſiderations relate immediately to thoſe principles of law upon which Government and the Conſti-

tution are founded, and by which alone they can be protected from libellous and other attacks. Whether ſuch arguments may not be ſometimes urged with an eloquence, or rather with a ſpecious ſophiſtry, that may, by the means of a momentary impulſe, obtain the ſanction and the approbation of a Jury, notwithſtanding all the wholeſome advice of a Judge, is well worthy of conſideration. Poſſibly the ſatisfaction and peculiar efficacy of conveying ſuch ſentiments through the reſpectable medium of a court of juſtice to the public at large, may encourage many perſons to invite proſecutions, in order to try the chance of their conſequences; while an Attorney General may on his part be afraid of hazarding the experiment of an appeal to Juſtice, and may be therefore obliged to abandon the preſs to unreſtrained licentiouſneſs and unbounded ſedition; and at laſt, the friends of order and decorum, of a mild Government, and of the beſt Conſtitution in the world (and you, Sir, among the reſt), may fruitleſsly deplore the fatal effects of raſh and inconſiderate innovation.

I have the honour to be,

&c. &c.